BEFORE THE
STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the Matter of the Appeal of
Joe Pacovsky
Marshfield Electric & Water
PO Box 670
Marshfield WI 54449-0670

PECFA Claim # 54449-0670-0
Hearing No. 01-45

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

On January 31, 2001, Marshfield Electric & Water Department (MEWD or the Utility), by its manager Joe Pacovsky petitioned the State of Wisconsin Department of Commerce (Department) to hold an administrative hearing to review the Department's January 5, 2001 decision on the Utility's PECFA claim. By its decision, the Department found the total amount of $26,118.54 submitted by MEWD to be noneligible for reimbursement. By the petition, pursuant to Wis. Stat. §101.02(6)(e) and COMM 47.53, Wis. Adm. Code, the Utility timely requested a contested case hearing on the Department's decision. (Petition at 1-4.) Following a pre-hearing conference before Administrative Law Judge Mari A. Samaras-White, the Department's March 2, 2004 Notice of hearing set the matter for hearing for September 8, 2004. By letter of July 7, 2004, Department counsel John Kisiel notified the petitioner that the hearing would be postponed. By letter of August 12, 2004, the Department notified petitioner's counsel that Attorney Joseph R. Thomas would now represent the respondent. The Department's October 1, 2004 Notice reset the hearing date December 21, 2004.

Pursuant to proper notice, a contested case hearing was held on December 21, 2004, in Madison, Wisconsin, before Administrative Law Judge Steven Wickland. Following the hearing the parties filed written briefs. The Department filed its brief, and petitioner's initial brief was received April 29, 2005. Petitioner's letter stating it would not be submitting a reply brief (as anticipated pursuant to the briefing schedule) was received May 19, 2005.

In accordance with Wis. Stat. § 227.47 and 227.53(1)(c) the parties to this proceeding are listed as follows:

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The issue noticed for hearing was: Whether the Department's decision dated January 5, 2001 was incorrect with regard to the disputed costs identified in petitioner's appeal received January 31, 2001. (March 2, 2004 pre-hearing notice.)

Applicable Statutes and Administrative Rules

Wis. Stat. § 101.143(1)(fg). Petroleum storage remedial action; financial assistance.

(1) Definitions. In this section:

> (fg) "Petroleum product storage system" means a storage tank that is located in this state and is used to store petroleum products together with any on-site integral piping or dispensing system. The term does not include…tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tanks owned by school districts and except as provided in sub. (4)(ei); or tanks owned by this state or the federal government."

ILHR 47.10(2) – in effect during the time the eligibility letter was filed - states, in relevant part:

> (2) PROVISIONS OF ELIGIBILITY LETTER. (a) When an owner, operator or person owning a home oil tank system has registered the tank systems on the property associated with the discharge and notified the Department as specified under s. ILHR 47.11, the Department shall upon request of the responsible party provide a letter of eligibility determination. This letter may include information on the PECFA program and the Department's initial determination of the eligibility for an award under this chapter.
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> (b) The initial eligibility determination is made by the Department based upon the information made available prior to the determination.
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> . . .
>
> (d) The initial estimate of eligibility shall not be binding if subsequently the owner, operator, person owning a home heating oil tank system or other source provides the Department with additional information which necessitates a subsequent ineligibility determination to be made by the Department.

Comm. § 47.53(1)(a) Wis. Admin. Code. Appeals and hearings.

(a) A responsible party, agent, consultant or consulting firm may request a hearing with the Department, as specified in ss.101.02 (6)(e), Stats., on any provision or decision made within the scope of this chapter except as specified in ss. Comm 47.03(2), 47.35(3), 47.335(2)(c) 8. and (3) (a) and para. (b) 2.

Findings of Fact

1. Marshfield Electric & Water Department, Marshfield, Wisconsin operated an electric power generating plant, the Wildwood Power Plant, at 2000 South Central Avenue, Marshfield, Wisconsin. The power plant was operated by natural gas, but had an above ground 150,000-gallon tank storage system (AST) containing No. 2 fuel oil as a back-up fuel source.
2. Although the Utility's AST had initially been used to store fuel oil for consumptive use on the property, the use of the AST changed. After plant closure in 1990, the fuel oil continued to be stored in the AST for later sale.
3. Pursuant to a Proposal/Contract dated July 20, 1990, the Utility agreed to sell the fuel oil to Midwest Industrial Fuel, Inc. ("Midwest Fuel"). (Pacovsky testimony and Ex. A-1 at page 2.) From July 31, 1990, until October 18, 1990, Midwest Fuel took nineteen separate deliveries of the fuel oil. (Pacovsky testimony and Ex. A-2.)
4. The sale was billed on October 22, 1990 by the Utility to Midwest Fuel, La Crosse, WI as 134,505 gallons in the amount of $44,386.65. (Exhibit A-1, page 3.)
5. The AST was removed in 1996. Petroleum contamination at the site was reported to the Department of Natural Resources' Eau Claire office on August 18, 1997 and the petroleum discharge was confirmed on December 3, 1997.
6. The Utility, by its consultant was aware of the possibility that the costs of remediating the contamination may have been reimbursable through the PECFA program and sought a determination from the Department as to whether the AST would be considered eligible for that program. (Pacovsky, Hahn testimony, Ex. A-1.)

7. The Utility's PECFA Initial Application and Eligibility Request dated December 12, 1997 was received by the Department on January 6, 1998. The application listed "Resale (Marketer) AST" as the tank type; provided the tank registration number and attached to the application the Proposal / Contract with Midwest Fuel and a receipt for sale of fuel oil. (Ex. A-1.)
8. PECFA claim reviewer Renee Dickey reviewed the Initial Application and Eligibility Request and sent the Utility a January 13, 1998 letter stating that "[f]rom the information available to the PECFA Program, it appears that a discharge from the [the Utility's] tank system "**is eligible** under the PECFA program for petroleum contamination clean-up costs" (emphasis in original). (Ex. A-4.)
9. Relying upon the Department's declaration of eligibility in January 1998 eligibility letter, the Utility performed the remediation and in doing so attempted to adhere to PECFA program requirements, steps the Utility would not have taken absent the program eligibility letter. (Pacovsky, Hahn testimony and Ex. A-6 listing program-related steps.)
10. The Utility's additional steps taken to satisfy the PECFA program requirements were to the its detriment, as the Utility incurred over $2,441.30 in costs that would not have been incurred if the site had been remediated outside of the PECFA program. (Brian Hahn testimony, Ex. A-6.)
11. Following the Department's January 1998 eligibility determination, the Department received no further information from the Utility that necessitated the Department later determining the Utility's tank system ineligible for PECFA reimbursement. (Pacovsky, Hahn testimony.)

12. The Department, following the January 1998 eligibility letter to the Utility, had no further communication to the Utility that the remediation costs might be PECFA ineligible until the Department by its January 2001 decision determined that the tank system was not eligible. (Pacovsky testimony.) The Department denied in full the Utility's claim for $26,118.54. (Ex. A-5.)

13. The Utility filed a timely Request for Hearing with the Department on January 31, 2001. The request alleged that MEWD was adversely affected by the decisions to deny the claim, and requested a hearing by the Secretary of the Department pursuant to Wis. Stat. § 101.02(6)(e) and Wis. Admin. Code § Comm 47.53. The request for hearing included allegations that MEWD, having received the Department's initial determination of eligibility for PECFA reimbursement, proceeded to clean up the site in reliance on that representation, and performed actions and incurred expenses so as to remediate the site to PECFA standards. The claim sought reimbursement of the costs incurred in the remediation of the petroleum-contaminated site in the amount of $26,118.54 which amount was the total dollars reviewed.

14. On February 5, 2001, then Department Secretary Brenda J. Blanchard granted the request for hearing. On November 17, 2003, then Department Secretary Cory L. Nettles issued a delegation order providing for hearing.

15. A pre-hearing conference was held on March 1, 2004, wherein an initial hearing date was set for September 8, 2004. The issue noticed for hearing was: Whether the Department's decision dated January 5, 2001 was incorrect with regard to the disputed costs identified in the petitioner's appeal received on January 31, 2001.

(March 2, 2004 hearing notice.) The Department's October 1, 2004 notice stated the same issue and provided a December 21, 2004 hearing date.

16. A contested case hearing was held on December 21, 2004, at the Department of Commerce, Madison, with Administrative Law Judge Steven Wickland presiding.

Discussion

The Utility petition sufficiency to raise the estoppel issue for consideration at hearing.

Wis. Stat. § 101.02(6)(e) provides that a person affected by a Department order (such as the PECFA decision here) may petition the Department for a hearing. § 101.02(6)(f), in turn, states:

> Such petition for hearing shall be by verified petition filed with the department setting out specifically...every issue to be considered by the department on the hearing. The petitioner shall be deemed to have finally waived all objections to any irregularities and illegalities in the order upon which a hearing is sought other than those set forth in the petition.

A threshold issue is whether the text of the January 31, 2001 MEWD petition for hearing limited the scope of the hearing to prevent the petitioner from raising the theory of equitable estoppel (and presenting evidence thereon) at hearing. If such is the case, then the ability to raise that matter has been waived. That in turn would mean that this proposed decision could not consider whether the Department should be equitably estopped from not following its January 1998 statement of eligibility and in January 2001 finding by its decision on claim that the tank system concerned was ineligible for PECFA reimbursement.

Review of the text of the petition demonstrates that the request for hearing did sufficiently raise the issue of whether, by the Department's initial indication of eligibility and

related events, the Department is estopped from subsequently determining that the tank system is PECFA ineligible and the remediation costs submitted in the claim cannot be reimbursed.

The January 31, 2001 request for hearing states, in pertinent part:

> On January 5, 1997, Marshfield filed an application with the Department to access the PECFA program. The Department issued a written response to this application on January 13, 1998, providing Marshfield with an initial determination of program eligibility.
>
> Relying on this initial eligibility determination, Marshfield undertook efforts to ensure the site was remediated in accordance with PECFA program requirements and subsequently filed a claim for reimbursement....
>
> A conclusion that the Department is bound by its initial eligibility determination is warranted not only by the language of the regulation cited above, but also by the fact that Marshfield expended significant time, effort and money relying on that determination. Specifically, based on the Department's initial eligibility determination, Marshfield ensured that the specified requirements of COMM 47 were followed throughout the duration of the remediation project. By following the COMM 47 requirements, Marshfield incurred additional work tasks and expenses that would not have been incurred otherwise, including, but not limited to, compliance with reimbursement procedures, commodity bidding and purchase requirements and the preparation and processing of the PECFA claim. In a situation such as this, where the Department is provided with all of the information necessary to make an appropriate eligibility decision and decides that a tank system is eligible for the PECFA program, and where relying on that determination, the claimant incurs significant costs complying with the program requirements, it is unreasonable for the Department to subsequently decide that the tank system is not eligible for the program.

To establish equitable estoppel, the Utility must demonstrate that the Department's action or non-action induced reasonable reliance to its detriment. Kamps v. DOR, 2003 WI App 106, 264 Wis. 2d 794, 663 N.W. 306. The Utility did, in the text of its petition or request for hearing, set out allegations asserting its reliance on the Department's eligibility letter and raised the matter of estoppel, without naming the doctrine. The Utility detailed in its petition its contention that it relied on the Department letter of eligibility. The petition asserts why its reliance was

reasonable. Finally, the petition specifies that the costs expended on the assumption of eligibility redounded to petitioner's detriment when the claim filed was rejected as ineligible. Pursuant to Wis. Stat. § 101.02(6)(f), because the petitioner here raised the elements with sufficient specificity to articulate the estoppel issue, it did not waive the ability to raise that issue at the hearing herein.

Testimony. The Utility presented the testimony of MEWD Manager Joseph Pacovsky, followed by consulting engineer and remediation project manager Brian Hahn. Department PECFA section Chief Dennis Legler and PECFA Reviewer Renee Dickey then testified for the Department. All exhibits were offered and accepted into evidence during the hearing. Each witness gave credible testimony providing their view of events and their perspective.

Utility Manager Joseph Pacovsky. The petitioner's first witness, Joseph Pacovsky is the Marshfield Electric & Water Department Utility Manager, a position he has held at least from 1997 (having started with them in 1987, when the tank system at issue was still used). He filed the appeal herein with the Department. The MEWD Wildwood Plant primarily burned natural gas. The fuel oil tank, for backup, contained no. 2 fuel oil. It provided backup to boilers to generate steam for electric generation. In 1990, following closure of the power plant, fuel oil remained in the tank; then a decision to sell the fuel oil was made. The late James Trierweiler, assistant manager of MEWD, made the arrangements for sale of the fuel oil to Midwest Fuel of La Crosse. Exhibit A-1 attachments include the terms of sale in the proposal/contract, and the merchandise bill issued by MEWD for 134,5000 gallons of fuel oil. Exhibit A-2 includes copies of the several receipts for approximately nineteen deliveries of the fuel during the period July through October 1990, after which no further deliveries were made. Pacovsky testified that nineteen deliveries were made to Midwest Fuel. After petroleum contamination was discovered

during the 1996 tank removal, the Department of Natural Resources August 20 1997 letter (Ex. A-3) to MEWD explained the Utility's cleanup responsibilities. DNR sent the letter after being notified by Becher-Hoppe Associates, Inc. (BHA) of "petroleum-related contamination being detected during the removal of the buried fuel oil supply piping associated with a former above ground storage tank system" at the Wildwood Power Plant. (Ex. A-3 at page 1.) Based on the letter, the Utility retained BHA to investigate the contamination.

Petitioner's PECFA Initial Application and Eligibility Request (Exhibit A-1) was filed with the Department, including pages 1-3, in late 1997. The documents were submitted to see if funds were available to reimburse the cost of remediation. Ex. A-1 at page one, under "tank type" has a check mark by the type "Resale (Marketer) AST" with a handwritten notation, "See attached receipt for sale of fuel oil."

Pacovsky testified that Exhibit A-4 is the January 13 1998 Department letter, signed by Renee Dickey, Bureau of PECFA stating: "From the information available to the PECFA Program, it appears that a discharge from the tank system **is eligible** under the PECFA program for petroleum contamination clean-up costs. The tank system(s) identified as inclusive with this eligibility finding is/are: 71130-0063, ELIGIBLE." Pacovsky testified that MEWD received this letter, and that the Utility decided to go ahead in the PECFA program following receipt. He stated that MEWD proceeded on the assumption the tank would be eligible under PECFA, because of the January 13, 1998 letter and the fact that there had been a sale of fuel oil product. To Pacovsky's knowledge, the Utility in the remediation complied with all the steps that the PECFA program required.

Pacovsky noted that certain steps were taken solely to comply with PECFA, which the Utility would not have taken had it not understood its remediation was PECFA eligible. The

Utility incurred added costs in this regard. After receiving the initial January 1998 letter, he stated that the Utility provided no further information to the Department as to the type of tank or as to the sale of product. He first received information from the Department that the tank might not be eligible when it received the Department's "Breakdown of PECFA Costs" bearing a decision date of January 05 2001 and showing $26,118.54 both as "total dollars reviewed" and as "amount not eligible." (Ex. A-5.) This represents a denial of all costs. Ex. A-5 at page 2 states: "Note to claimant: This is not an eligible tank system. The primary use of the 150,000 gallon aboveground fuel tank was for consumptive use on premises. The tank was not used for resale purposes. The sales slip that was presented to this Department for proof of resale is not considered a pattern of sales but rather a one time occurrence." Pacovsky had not been aware of the term "pattern of sales."

On cross-examination, Pacovsky said the tank was initially installed to store fuel oil to supply a boiler. The 1990 sales of fuel oil were made to dispose of the fuel oil in the tank. There were no further MEWD purchases of fuel oil afterwards. The Utility's business is to provide water and electricity to its customers, not to sell fuel oil. Mr. Pacovsky is not knowledgeable of the statutes applicable to petroleum storage. He said that, absent the January 1998 Department letter, the Utility would have taken none of the PECFA steps, rather it would take the most cost effective steps. The January 1998 letter, Pacovsky stated, does provide that PECFA cleanups must be done in the most cost-effective manner. (Ex.A-4.)

Becker-Hoppe project manager Brian Hahn. This testimony was taken by telephone. Brian Hahn is a professional geologist and hydrogeologist with Becker-Hoppe Associates (Becker-Hoppe or BHA) in Wausau. He has worked with PECFA claims for his entire fifteen-year career, working on over twenty claims filed with the Department. Hahn began on the

Utility remediation project at issue here in 1997 or 1998, as senior hydrogeologist and project manager, to clean up the site. He had a copy of the hearing exhibits before him as he testified. He discussed the Department's reason for denying eligibility and the Department's note to claimant therein.

Hahn said his understanding was that no "pattern of sales" is required by the code provisions, so that once the Department declares PECFA eligibility, absent new information, that declaration is "proof that the claimant is in the system" and is binding. He discussed the significance of the tank registration number (711300063) listed on Ex. A-1, the PECFA initial application. He said the number is likely provided to track PECFA claims; also to know the tank is in the system. It provides proof that the tank exists, at a particular location.

Hahn noted that the initial PECFA application and eligibility request would be submitted so that an entity could have assurance that you "have eligibility before the project begins, so you can establish financing for that project." Often, claimants do not have the money to pay for [remediation project] bills, other than deductibles and co-pays. They have to get bank loans and rely on that eligibility determination even before they begin the project. Independent of the question of a bank loan, getting a Department declaration of eligibility provides, before one begins a project, an "offset" against further expenses resulting from the remediation. The offset of expenses, to Hahn, means the ability to enter into the cost sharing program at a time, before the project, when the total remediation cost may be uncertain and program participation will help defray project costs. For this project, the Utility or Becker-Hoppe did not have a precise idea of costs going in. Therefore, seeking the Department declaration, to Hahn, meant, "funding eligibility, basically to defer liability, to defer risk, just in case the cost of remediation was more than the budget you had allotted for that project."

Hahn testified that it is "reasonable" for a party that receives a Department determination that it is eligible (based on the party's request for such determination) to rely on that determination. Absent the ability to rely on that, then all projects would have an uncertainty about them. Hahn stated that Becker-Hoppe, as consulting engineer for the Utility, took additional steps to comply with the PECFA programs – commodity bidding, lab services, drill and geoprobe services, and putting together the PECFA claim itself. Exhibit A-6 shows the additional PECFA costs, totaling about $2,441.30.

On cross-examination, Hahn stated that while he was involved in about twenty PECFA projects, that as far as putting together PECFA claims himself, he had prepared five claims. For the PECFA claims he filed, Hahn said that as to the primary business of those claimants, some were gas stations, some had tanks used to fuel government vehicles, and others were tanks for township garages. He agreed that many of those tanks had capabilities for refueling vehicles. Hahn understands that tanks on premises for consumptive purposes are not PECFA eligible. He stated his view that in this case "there was a sale of product from the tank and a PECFA eligibility determination came back that the system was eligible.... And unfortunately these things don't get reviewed until after the fact." Hahn was asked if a declaration of eligibility guaranteed payment under the program. He stated that it did not guarantee payment of all costs. He understood that the program typically paid those costs that are normal and customary. "But, as far as I knew, you were eligible for the program based on that letter. Which met that if you did things right, if you did things properly...to meet [the code provisions] your costs would be eligible."

The eligibility declaration had been made when Hahn started working on the project. The overall costs included to approximately $21,000 project costs (Ex. A-6) and the additional

amount for complying with specific PECFA program elements. The total claim filed was $26,118.54. Hahn discussed the specific project tasks listed in Exhibit A-6, page 1 as follows: project management; correspondence / conference; bidding commodities; contractor coordination; field investigation; data interpretation; data reduction and reporting; and PECFA claim coordination. Exhibit A-6 lists the costs associated with each task.

PECFA Claims Section Chief Dennis Legler. The Department presented the testimony of Dennis Legler, who has been part of the Department's PECFA program since 1992, starting as a claim reviewer. Mr. Legler is currently chief, PECFA claims review section, a position he has held since 2000. As such he supervises all phases of the section's activities and oversees the fifteen members of the PECFA claims review staff, who evaluate claims for reimbursement consideration. Mr. Legler described the training of claim review staff, including the complex nature of the PECFA program, and having senior claims reviewers check the work of new claim reviewers for their initial six months to one year. The senior claims reviewers in turn report to him.

On difficult issues, Mr. Legler makes the final decision on reimbursement claims. Due to the complexities of the program, occasional mistakes are made in applying the statute and administrative rules. If a mistake is made, Mr. Legler attempts to correct it, yet also seeks to adhere to the statute governing the PECFA program, Wis. Stat. Sec. 101.143(1)(fg). Legler reviewed the claim herein. He determined that the Department, given the statutory exclusion of fuel oil consumption on the premises from reimbursement, could not consider the MEWD tank system as eligible for PECFA reimbursement.

On cross-examination, Legler explained the reason for denial, referencing Exhibit A-5 note to claimant, set out above. (Ex. A-5, page 2.) Legler did not write that language but agrees

with it. The lack of a pattern of sales meant that the tank was not eligible. Even a "pattern of sales" would not, in Mr. Legler's opinion, make the tank system eligible because the Department views the tanks main use was for consumptive use on premises. Legler did say that a tank system use could change, such that it becomes an eligible system (such as changing from use on premises to resale marketer facility). The determining point would be changing the registration based on use, with an explanation as to the change in use. The Department might want sales receipts to support a change to resale. Legler discussed how a change in use would fit into the section 101.143(1)(fg) language, with the need to include a dispensing system (although such a system is not defined in the statute). Legler acknowledged that a change of use from consumptive use to marketer could make this system PECFA eligible. Ex. A-1 for tank type lists the tank as "Resale (Marketer) AST." That exhibit at page 2-3 is the July 1990 contract for sale of 134,505 gallons of #2 fuel oil from MEWD to Midwest Fuel. Legler thought Renee Dickey likely had this information, but would also consult with another staff member in making the determination.

Mr. Legler, as to additional information subsequent to the initial application, believed that there was additional information received from consultant Becker-Hoppe. He cited the Becker-Hoppe October 2, 1997 cover letter and report (Exhibit R-3) to the DNR on the contaminated soil project at issue here. The BHA cover letter report identified the use as backup fuel source.

The initial review and decision was made on January 5, 2001 (Ex. A-5.) Mr. Legler stated he did not believe that the Department, once the January 13, 1998 eligibility letter (Ex. A-4) went out, had any further contact with MEWD about eligibility matters. Typically, from a claims standpoint, the Department would have no contact with the claimant, here MEWD, until

the claim actually is filed. There would typically be no further Department correspondence from the time eligibility is indicated until the claim is received.

Mr. Legler then compared the status resale (marketer) and that of sale of disposable product. He noted that a marketer would normally mark the price of sale up to make a profit yet here MEWD likely sold this rather large quantity for a price below what they paid for it. Legler does not specifically know what MEWD paid to obtain the fuel oil originally, so he does not know if MEWD made a profit on the 1990 sale or not.

Renee Dickey, PECFA program testimony. The Department also called Renee Dickey to testify. After gaining experience in business and in another state employee position, Ms. Dickey joined the Department in 1996 with the PECFA program and continues in that section. Since 1999 she has been a PECFA program specialist. She reviews claims to determine eligibility of costs. She reviews initial PECFA eligibility requests to make an assumption of eligibility based on information at that time (typically fairly limited information). When Ms. Dickey reviewed the file for the Utility, in 1998, including Ex. A-1, she noted that the applicant-checked designation thereon of tank type being "Resale (Marketer) AST." That designation means to her that "essentially they were requesting (by the application with that designation) eligibility for a marketer status on an above ground storage tank system." She said she later discovered that such usage was not the primary usage of the tank system. Subsequently, she testified that, to her understanding, the primary use was consumptive use on the premises.

Ms. Dickey formed an opinion during her review, prior to issuing the eligibility letter, that the tank status was non-marketer, non-eligible. Based on this, Ms. Dickey considered why the Utility would be coming in for marketer status. After looking at the documents, she conferred with someone in the Department as to whether or not "we were going to give them the

marketer status." She does not recall which staff member that was. But that staff member provided an opinion on that, and based on the opinion of other staff, "we went ahead and issued 'above ground marker' status and the eligibility letter." She testified that Ex. A-4 is a standard form letter, issued after she inserts status and coverage the entity is eligible for, based on information available to the Department at the time the letter is issued. At that time, Ms. Dickey noted (per the letter at paragraph 3) "From the information available to the PECFA program, it appears that a discharge from the tank system is eligible under the PECFA program for petroleum contamination clean-up costs." Ex. A-4. Thus, based on information available together with conferring with another Department staff member that the decision was made to issue marketer status. Ms. Dickey said the Department reserved the right if new information that indicated otherwise that this decision would not be binding. She did not specify how or in what form any reservation was made. Subsequently, Ms. Dickey said she understood that a report (dated October 2, 1997 to DNR) included with the claim (filed January 2001) indicated that the primary tank system use was consumption on premises. Ms. Dickey believes that the Department's ultimate decision that the tank system was ineligible was correct.

The witness on cross examination discussed the consultant BHA October 2, 1997 letter and report (Ex. R-3) addressed to DNR was part of the Department's claim file in 2001 (but not part of the 1997 Utility application for eligibility). The BHA October 2, 1997 cover letter states that the AST was installed at the MEWD Wildwood Power Plant in 1970 to "provide a backup fuel source to the coal powered plant." (Ex. R-3 at page 2.) This was the first time she had information about the use at the Wildwood Plant. The letter was addressed to DNR. Ms. Dickey first reviewed this information well after issuance of her January 13, 1998 eligibility letter. She testified that she did not review this document (Ex. R-3) before January 2001 (i.e., until after the

claim was filed). She assumes that when the 2001 claim was reviewed, the BHA letter was part of the Department's file.

As to the tank registration form, Ex. R-2, Ms. Dickey noted checking the occupancy type as "utility" does not mean that the tank cannot be used for other purposes. Ms. Dickey said that in reviewing the MEWD initial PECFA application of December 17, 1997 she also considered pages 2 and 3 of the application (the proposed contract for sale) (Ex. A-1) in making her determination in January 1998 of PECFA eligibility. Ms. Dickey says, looking back, that she made a mistake considering what she knows now and what she believes the tank was used for.

Discussion of merits of estoppel issue.

Having above decided that the petition satisfactorily raises the estoppel issue, it is appropriate to review the evidence considered at hearing in terms of whether the petitioner proved that the elements of estoppel exist here. Petitioner must show those elements are present – reliance, that is, reasonable reliance, by the Utility on the Department declaration of eligibility to the detriment of petitioner. The estoppel aspect extends to the entire claim, as the 1998 eligibility finding by the Department led to a claim containing all costs to remediate.

Utility Manager Joseph Pacovsky testified to several matters. He testified that: the Utility closed the Wildwood Plant in 1990 and sold the fuel oil in the tank; that following the discovery in 1997 of contaminated soil associated with the tank system, the Utility applied for PECFA eligibility, listing on its application the tank type as resale (marketer) AST. Pacovsky said that after receipt of the January 1998 Department eligibility letter, the Utility decided to pursue the cleanup, on the assumption that the tank system was program eligible and costs of cleanup would be eligible for reimbursement. MEWD proceeded with the remediation project, having Becker-

Hoppe clean up the site and doing so in a manner to comply with PECFA program requirements. Neither Pacovsky nor Becker-Hoppe project manager Brian Hahn was aware of any need for to show a pattern of sales to be considered a marketer. Nor do Department regulations specifically require a pattern of sales.

Pacovsky's testimony establishes reliance by the Utility on the Department's letter, from being advised of eligibility, starting and completing the remediation, gearing the project toward PECFA requirements, and submitting no new information that would suggest that the marketer designation is inappropriate. Hahn's testimony as consultant further explains the reasonableness of that reliance. Hahn notes that 1997 PECFA initial application and request for eligibility was submitted for a purpose. Hahn, as referenced above, said that it is "reasonable" for a party receiving a Department determination that it is eligible (based on the party's request for such determination) to rely on that determination. Such determination assists in getting initial bank funding and/or in giving assurance that the often-substantial costs of remediation will be eligible for the PECFA program. In that manner, the claimant is in a much better position prior to starting the project that the costs will be reimbursed.

Finally, the testimony of PECFA review staff supports the notion of reasonableness of reliance. The January 1998 letter does state: "From the information available to the PECFA Program, it appears that a discharge from the tank system **is eligible** under the PECFA program for petroleum contamination clean-up costs." (Ex. A-4.) Ms. Dickey testified that she had some doubts after reviewing the 1997 PECFA application as to whether the Utility should be found program eligible based on a assertion of "marketer status." Yet, after looking at the documents, she conferred with other Department staff as to whether petitioner could be given marketer status. Based on the opinion of other staff, the "above ground marker" status was not disputed

by the Department, and January 13, 1998 eligibility letter was issued to the Utility. This status was not revoked or altered between the 1998 letter and the 2001 Department decision. Thus, Ms. Dickey, acting in good faith, reviewed the eligibility request, discussed her doubts with other staff, and following that discussion, the decision was made to grant eligibility, in effect, based on a change of status to Resale Marketer (AST).

The testimony shows that, after some consideration, the Department did approve the eligibility request, and supports the conclusion that the petitioner reasonably relied on that fact in completing its project and filing the PECFA claim. In turn, the documents and Hahn testimony support the expenses of approximately $26,000 for the remediation and associated tasks, making the denial of the full amount a detriment to petitioner. Accordingly, the petitioner has demonstrated that the elements of equitable estoppel are present here.

The tank system, because of the sale of product, is eligible for the PECFA program.

Wis. Stat. §101.143(1)(fg) defines a "petroleum product storage system as:

> A storage tank that is located in this state and is used to store petroleum products together with any on-site integral piping or dispensing system. The term does not include . . . tanks used for storing heating oil for consumptive use on the premises where stored, except for heating oil tank owned by school districts and except as provided in sub. (4)(ei); or tanks owned by this state or the federal government.

The Department's regulations reflect this definition (in ILHR 47.015(27)). And ILHR 47.02(1) provides that claims for "[h]eating oil tank systems where the product is sold" are eligible for reimbursement. ILHR 47.02(1)(b).

As argued by petitioner, neither the regulations nor the statute deal directly with the circumstance where, as here, the initial use of a tank may have placed it within an exclusion to coverage, but a subsequent use would have rendered it eligible for reimbursement. As Dennis

Legler noted at hearing, there have been situations where a tank that was used to store product for consumptive use was later changed to be used to store product that is sold, and in those situations, the Department has considered the tank eligible for the program.

Based on the application for PECFA eligibility (that, in effect, requested a change in user status to resale marketer) it is appropriate to find that the Utility is PECFA eligible as the tank was considered to have the proper status in the 1998 eligibility letter and no further communication from the Utility or the Department (prior to the 2001 claim decision) challenged, questioned, or changed that status.

The Utility closed the Wildwood Plant in early 1990. Several months later, it entered into a contract with Midwest Fuel. The product was then delivered to Midwest Fuel over a three-month period with 19 separate deliveries of product going to various locations. (Exhibit A-2). Thus, the product was "sold," rendering the tank eligible under ILHR 47.02(1)(b). The terms "sale" or "sold" are not defined in the code.

Although the Department in its denial of claim took the position that the MEWD had to show a "pattern of sales," in order for the tank to be eligible, the regulations did not include that requirement. The ILHR regulations in place at the time provided that the "dictionary meaning shall apply for all . . . words [not otherwise defined in the regulations]." ILHR 47.015. Petitioner cites as the dictionary meaning of the word sell (or sold) is "To exchange or deliver for money or its equivalent." The American Heritage College Dictionary, 4th Ed., 1259. This definition supports petitioner's position that a "pattern of sales" is not required.

Because the Utility did sell its product to Midwest Fuel after ceasing use of the product on the premises, the Department would be warranted in concluding that a change of use has occurred. Accordingly, as the Department has on occasion done in the past, it can look to the

subsequent use and determine that coverage exists, even if the tank's prior use would have rendered it ineligible. The Department was not precluded, either by statute or regulations, from determining that the Utility's storage of fuel oil to be sold rendered the tank eligible. The initial, 1998 Department determination that eligibility existed was appropriate.

CONCLUSIONS OF LAW

1. The Department of Commerce has authority under Wis. Stat. §§ 101.02(6)(e), and § 227.47, and Wis. Admin. Code COMM § 47.53, and in accordance with the Findings of Fact herein, to issue a final decision as to the correctness of its decision.
2. The Department is the State's lead agency responsible for PECFA program. Under Wis Stat. §101.143, the Department administers that program and evaluates and makes decisions on claims for PECFA reimbursement of eligible costs of remediation of contaminated sites.
3. The single issue to be decided in this case is whether the Department's January 5, 2001 decision was incorrect with regard to denying the disputed costs identified in petitioner's appeal received January 31, 2001.
4. The Utility's petition for hearing raised the contention that the Department is equitably estopped from making its ineligibility decision, such that, pursuant to Wis. Stat. § 101.02(6)(f), it is deemed not to have waived the ability to raise that issue at hearing.
5. The Department regulations in effect at the time MEWD filed its claim for reimbursement provided that owners and operators of petroleum product storage systems would be eligible for reimbursement provided that the claims were for storage systems that were, among other system types, "[h]eating oil tank systems where the product is sold." The same regulations

excluded from coverage "[n]onresidential heating or boiler tank systems where the product is used on the premises where it is stored." Wis. Adm. Code ILHR 47.02(1), 47.02(3).

6. Neither Wis. Stat. §101.143, nor the Department regulations, address the situation where an initial tank use may have placed a system within an exclusion to coverage, but a subsequent use would have rendered the system eligible for reimbursement. As the Department has, in the past, determined that a prior use within an exclusion to coverage does not preclude a later use from rendering a tank system eligible for reimbursement, it is appropriate to apply that implementation here.
7. The MEWD's initial use of its AST as a system to store fuel oil for consumptive use on the premises does not preclude an eligibility determination if a subsequent use would have rendered the tank eligible for reimbursement.
8. The Department regulations in effect at the time of the MEWD's claim stated that the dictionary meaning shall apply for all words not otherwise defined in the regulations. Wis. Adm. Code ILHR 47.015. The regulations did not define the meaning of "sold" under Wis. Adm. Code ILHR 47.02(1)(b). Therefore, the dictionary meaning of this term controls. "Sold" is a derivative of the word "sell," which means "[t]o exchange or deliver for money or its equivalent." American Heritage College Dictionary, p. 1259 (4th Ed.).
9. It follows that there is no requirement that there be a "pattern of sales" from a tank system before a tank can be deemed a storage system from which product is sold.
10. The Utility used its AST to store No. 2 fuel oil that was ultimately sold to Midwest Fuel. The product was not, at the time of the sale, used on the premises. The AST was therefore eligible for coverage under the PECFA program pursuant to Wis. Adm. Code ILHR 47.02(1)(b), as a heating oil tank system where the product was sold.

11. The Utility established that it relied on the Department's January 13, 1998 letter of eligibility and that its reliance thereon was reasonable. The Utility's reliance was to its detriment, as it expended $26,118.54 in completing the remediation work, including a portion of that amount to meet PECFA program requirements, which work and total amount was ultimately determined by the Department to be PECFA ineligible. Because the Utility reasonably relied on the Department's initial eligibility determination to its detriment, the Department is estopped from rescinding that determination and concluding that the AST is not eligible for program reimbursement.
12. The Department's January 5, 2001 decision that the $26,118.54 that the MEWD submitted for reimbursement is reversed, and the MEWD is entitled to receive payment of that amount, minus its deductible, and plus interest.

STATE OF WISCONSIN
DEPARTMENT OF COMMERCE

In the Matter of the Appeal of

Joe Pacovsky
Marshfield Electric & Water
PO Box 670
Marshfield WI 54449-0670

PECFA Claim # 54449-0670-0
Hearing No. 01-45

PROPOSED DECISION

NOTICE OF RIGHTS

Attached are the Proposed Findings of Fact, Conclusions of Law, and Order in the above-stated matter. Any party aggrieved by the proposed decision must file written objections to the findings of fact, conclusions of law and order within twenty (20) days from the date this Proposed Decisioin is mailed. It is requested that you briefly state the reasons and authorities for each objection you wish to make. Send your objections and argument to: Madison Hearing Office, Department of Commerce, PO Box 7838, Madison, WI 53707-7838. After the objection period, the hearing record will be provided to the Deputy Secretary of the Department of Commerce, who is the individual designated to make the FINAL decision of the department in this matter.

ADMINISTRATIVE LAW JUDGE:
Steven Wickland

DATED AND MAILED:
July 29, 2005

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